SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 56

PENNSYLVANIA RAILROAD COMPANY AND BROTHERHOOD OF RAILROAD TRAINMEN, PETITIONERS,

vs.

N. P. RYCHLIK, INDIVIDUALLY AND ON BEHALF OF AND AS REPRESENTATIVE OF OTHER EMPLOYEES OF THE PENNSYLVANIA RAILROAD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 24, 1956

—408-5

[fol. 1]

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

N. P. Rychlik, individually and on behalf of and as representative of other employees of the Pennsylvania Railroad,

vs.

U. D. Hartman, individually and as a member of and on behalf of and as representative of the Brotherhood of Railroad Trainmen; H. F. Sites, individually and as a member of and on behalf of and as representative of the Brotherhood of Railroad Trainmen; S. G. Gailey, individually and as a member on behalf of and as representative of the Brotherhood of Railroad Trainmen, and The Pennsylvania Railroad Company, a corporation.

Brotherhood of Railroad Trainmen, Party Defendant.

Civil Action No. 23709

Docket Entries

1955

January 28. Filed complaint

January 28. Filed and entered order to show cause why defts. should not be restrained—ret. Feb. 3/55—adj. Feb. 8—Decision reserved—no issuance of summons—letter of Atty.

January 28. Initial docket report made up

January 31. Filed marshal's return on service of complaint & order to show cause—served Jan. 31/55—Pa. RR. Co.

February 7. Filed marshal's return—served S. G. Gailey Feb. 2/55

February 16. Filed marshal's return—no service on H. F. Sites

February 23. Filed Opinion, Knight, J,

[fol. 2] March 1. Filed & entered order granting injunction pending appeal—Knight, J. (Notice & copy mailed Mr. Tillou & Mr. Adams)

March 2. Filed & entered order vacating injunction pending appeal & Knight, J. (Notice & copy mailed Mr. Tillou & Mr. Fix)

March 2. Filed motion for dismissal of complaint

March 2. Filed & entered order permitting Brotherhood of RR. Trainmen to intervene as parties deft.—Knight, J. (Notice & copy mailed Mr. Fix & Mr. Adams—Mar. 4/55)

March 4. Filed & entered order dismissing complaint—Knight, J. (Notice & copy mailed Mr. Fix & Mr. Adams)

March 4. Final docket report made up

March 18. Filed notice of hearing for reconsideration—ret. Mar. 21/55

March 18. Filed motion for reconsideration to vacate judgment & leave to file amended complaint—ret. Mar. 21—Decision reserved

March 29. Filed Opinion, Knight, J.—denying above motion

April 1. Filed notice of appeal—copy sent Adams, etc. & Mr. Tillou

April 1. Filed bond for costs on appeal

April 1. Filed affidavit of W. E. Conrad

May 9. Filed affidavit & order extending time to file record on appeal to June 30/55, entered order—Burke, J. (Notice & copy mailed Mr. Adams & Mr. Tilou—5/10/55)

May 13. Filed & entered order denying pltff's motion for reconsideration to dismiss complaint & file amended complaint—Burke, J. (Notice & copy mailed Mr. Fix & Mr. Adams)

June 22. Filed testimony

June 22. Filed stipulation re contents of record on appeal

June 24. Original pertinent papers & Clerk's certificate mailed Clerk, CCA

[fol. 3] UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

[Title omitted]

COMPLAINT—Filed January 28, 1955

Plaintiff complains of the defendants and each of them and for cause of action alleges that:

1. The plaintiff is an employee of the defendant, the Pennsylvania Railroad Company, and has been employed as an operating employee by the defendant Company for a period of more than two years and was employed until January 14, 1955, as a Trainman on its railroad lines, principally on its lines running out of Buffalo, New York; plaintiff also complains as an employee of and on behalf of and as a representative of other employees of the Pennsylvania Railroad Company, who are so numerous that it is impracticable for them to appear before the Court, not herein specifically named and set out as individual plain-[fol. 4] tiffs, or as employees, and as representing many of the employee- of the said Pennsylvania Railroad Company, who are too numerous to be set forth herein, as parties plaintiff, as a class in this action, all of whom have a vital and great interest in this cause of action, and who are greatly affected and concerned in all of the facts alleged below.

2. The Brotherhood of Railroad Trainmen (hereinafter referred to as B.R.T.) is a labor organization, certified under the Railway Labor Act, to represent operating employees of the said Pennsylvania Railroad Company, employed as brakemen and conductors on its railroad lines, with offices in the City of Cleveland, State of Ohio, and with Local Unions in many States of the country, including Local No. 556, in the City of Buffalo, State of New York; the defendants, U. D. Hartman, H. F. Sites and J. E. McFarland, are members of the said B.R.T. and of the said Local No. 556.

3. In addition to the individual defendants named herein, all the members of the aforesaid B.R.T. are so numerous that it is impracticable and impossible to bring all of them before the Court; that all other members of the aforesaid B.R.T. not herein specifically named and set out as individual defendants or as members of and as representing all of the members of the said Labor Organization and who are too numerous to be set forth herein, as well as all the officers, agents, servants and employees of the aforesaid Labor Organization, are hereby made parties defendant as a class in this action; that the defendants, U. D. Hartman, H. F. Sites and J. E. McFarland are named defend-

ants in their individual capacities and as members of and as representing all of the members of the aforesaid B.R.T., and have been joined as parties defendant herein in their aforesaid representative capacities to defend this cause for and on behalf of all the members of the B.R.T.

[fol. 5] 4. The defendant, the Pennsylvania Railroad Company, is a Pennsylvania Corporation, maintaining railroad lines in several States including the State of New York and the County of Erie, and is engaged in the business of interstate carrying of freight and passengers, and employs the plaintiff and his fellow employees associated with him in this action as operating employees.

5. The plaintiff and other employees of the defendant Company, during the year 1953, allowed their membership in their Labor Organization to lapse, and were cited by the defendant Labor Organization for non-membership; the plaintiff and his fellow employees have since applied for reinstatement in the defendant Labor Organization, which covers their type of employment.

6. That jurisdiction is founded upon interpretation of the Railway Labor Act, so-called, U. S. Code Title 45, Chap. 8, diversity of the residences of the parties, and that the matter in controversy exceeds exclusive of interests and costs, the sum of $3,000.00.

7. The defendant Labor Organization has refused to reinstate the plaintiff and his fellow employees, and has voted to deny them membership, regardless of their application for membership or reinstatement.

8. The defendant Labor Organization and the individual defendants have forced the defendant Company to discharge the plaintiff and his fellow employees, to the great damage and irreparable injury of the plaintiff and his fellow employees, although the defendant Labor Organization has voted to deny them membership, despite plaintiff and his fellow employees pursuance of every method available to them to gain admittance, in violation of the Railway Labor Act, U. S. Code Title 45, Chap. 8.

[fol. 6] 9. The defendant Labor Organization has denied the plaintiff and his fellow employees reinstatement and membership in the said organization, and caused their discharge for such lack of membership in said organization

contrary to the Railway Labor Act, supra, which provides in Section 2, Eleventh:

A. That membership in the labor organization cannot be required as a condition of continual employment,

> "with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than failure of the employee to tender the periodic dues, initiation fees, and assessments * * * uniformly required as a condition of acquiring or retaining membership."

The plaintiff and his fellow employees, despite the expressed provisions of the Railway Labor Act, supra, have received telephone notice of discharge from the defendant Company.

10. That the plaintiff is in fact a member of the Switchmen's Union of North America, a union uniformly recognized to be national in scope and has been a member in good standing since July 31, 1954. That because of such membership the plaintiff came within the terms of the Railway Labor Act, supra, which states in Section 2, Eleventh:

> "(c) That requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph 1 be satisfied, as to both a present or future employer in engine, train, yard, or hostling service, that is, an employer engaged in any of the services or capacities covered in the First division of subsection (h) of Section 153 of this Title, define the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; * * *"

[fol. 7] That the said plaintiff has complied with the above quoted provisions, in that he is a member in good standing of the Switchmen's Union of North America, and that de-

spite this fact, and with full knowledge of this fact, the defendant Company, upon the insistence of the defendant representatives of the B.R.T., has terminated the plaintiff's employment.

11. The defendant Labor Organization and the individual defendants named above have entered into an unlawful and illegal combination and conspiracy among themselves and others acting in concert with them for the following purposes:

To compel the defendant Company to discharge the plaintiff and his fellow employees in violation of their rights under the Railway Labor Act;

To cause the discharge of the plaintiff and his fellow employees for non-membership in the B.R.T. when such membership is denied in violation of the Railway Labor Act.

12. By reason of the aforesaid unlawful conduct of the said defendants, the plaintiff and his fellow employees will be deprived of their employment and greatly injured to their excessive loss in excess of the sum of $3,000.00 each.

13. The commission of the said unlawful actions has resulted in substantial and irreparable injury to the plaintiff and his fellow employees, and prevented them from earning their livelihood, and the granting of necessary relief herein prayed for will inflict no injury on the defendants.

14. The plaintiff and his fellow employees have no adequate remedy at law by which the defendant can be immediately stopped from preventing the plaintiff and his fellow employees from earning their livelihood. The public officers charged with the duty of protecting the rights of the plaintiff and his fellow employees are unable to provide the needed protection as there is no open breach of the peace or law, of which the public officers can take notice, unless directed by the Court.

[fol. 8] 15. Unless a temporary restraining order shall be issued without notice, substantial and irreparable injury to the rights of the plaintiff and his fellow employees will continue.

16. The plaintiff and his fellow employees have complied with all obligations imposed by the law in that they have made tender of membership dues, which tender was unlaw-

fully refused, and they have made every reasonable effort to settle the dispute involved in this action.

17. The plaintiff and his fellow employees were unable to make application to the Court to restrain their unlawful discharge before said discharge took place, since they were first notified of said discharge by telephone, and thus had no cognizance of the fact that they were about to be discharged until such discharge actually took place.

18. On March 26, 1952 defendant Company made and entered into an Agreement with the said B.R.T. as bargaining representative of the plaintiff and his fellow employees, in which Agreement it was stated that:

> "This Agreement is entered into * * * in accordance with Section 2, Eleventh of the Railway Labor Act, as amended * * *", (a copy of which Agreement is attached hereto and made a part hereof as Exhibit A).

19. That the said Agreement (Exhibit A) is invalid inasmuch as it violates the provisions of the National Railway Labor Act, Title 45, U.S.C.A. 151, et seq., and as amended, and especially Section 152, Eleventh thereof in many respects, among them being,

(a) That Section 152, Eleventh does not provide for a System Board of Adjustment to be incorporated into an Agreement between the defendants herein to determine complaints *initiated* by the Bargaining Agent against the employee;

(b) That the System Board of Adjustment that the defendants provided for in said Agreement (Exhibit A), [fol. 9] namely, one sanctioned only by Section 153 Second of the Act, concerns itself by the provisions of the Act, and said Section, only with those specified controversies between employee and carrier and not with complaints initiated by the employees' own bargaining representative against the employee;

(c) That the provision in said Agreement requiring that the employees' own bargaining representative change its position and duty of fealty and loyalty to the employee to that of antagonist, complainant, and accuser of the employee in respect to the employees' employment relation-

ship with the employer; all of which is contrary to the provision of the Act and the law of principal and agent;

(d) That the Agreement provides for, and without sanction in the Act, and contrary to American jurisprudence, that the Bargaining Agent of the employee who has changed its position to that of accuser, shall sit in judgment of the employee in reference to its own complaint by it initiated against its principal;

(e) That the agreement attempts to provide finality to such Board's decision without the right to appeal or review or sanction from the provisions of the Act;

(f) That as a result of the conflicting role in which it places the employees' own representative, it leaves the employees unrepresented; for under the provisions of the Act, the employee is required to contact the employer through the employee's representative in matters concerning his employment;

(g) That the whole substance of the Agreement makes the employees' own bargaining representative accuser, judge, and jury, in respect to the employees' right to work, all of which is in direct conflict with settled principles of American jurisprudence;

[fol. 10] (h) That the provisions in (7c) of said Agreement making the decision of the so-called Board of Adjustment final and binding are contrary to the provisions of Section 153 Second of said Act even as to those things permitted to be handled by a System Regional Board of Adjustment (the matter in the case at bar not being one of them).

Wherefore, the plaintiff prays the Court

1. That a temporary restraining order be issued without notice against the defendants, and each of them, the officers, agents, servants, employees and attorneys and all other persons in active concert or participation with them, of the B.R.T. and the defendant Company from:

A. Continuing the discharge or suspension of the plaintiff and his fellow employees for non-membership in the defendant Labor Organization, until they have been given the opportunity for readmission or membership in the said

Labor Organization under the same terms and conditions as are available to any other member.

B. Or, in lieu of the above that the defendant Railroad Company cease and desist from continuing the discharge or suspension of the plaintiff and his fellow employees for non-membership in the defendant Labor Organization until they have been given the opportunity for readmission or membership in said Labor Organization under the same terms and conditions as are available to any other member.

C. Threatening, forcing or in any way coercing the defendant Company in order to obtain the discharge of the plaintiff and his fellow employees contrary to the statute, until after they have been allowed an opportunity for reinstatement and membership under the same terms and conditions as for any other member.

D. Refusing to permit or allow the reinstatement of the plaintiff and his fellow employees, under the same terms [fol. 11] and conditions as are available to any other member, if the defendants seek to make membership a condition of employment as required by the statute.

E. Enforcing the provisions of the Union Shop Agreement between the defendant Company and the defendant B.R.T. (Exhibit A) to terminate the plaintiff and his fellow employees' right to work; and especially from enforcing the provisions of Section 7 of the said Agreement, which Section sets up a representative of the B.R.T. as an accuser, prosecutor, judge, and jury as to the plaintiff and his fellow employees' right to work.

2. That a date be fixed for the hearing of plaintiff's application for a preliminary injunction herein after due and personal notice thereof shall have been given to such persons and in such manner as the Court shall direct, and that upon such hearing a temporary injunction be issued against the defendants and each of them; and the officers, agents, representatives and employees and the members of the B.R.T., and of the defendant Company, as specifically prayed for under paragraph 1 of this prayer.

3. That upon a final hearing, this Court will grant and issue a permanent injunction against the defendants and each of them and the officers, agents, representatives and employees, and the members of the B.R.T. and of the defend-

ant Company and each of them or any of them, and against all persons now or hereafter aiding or abetting them or any of them, enjoining and restraining them and each of them as specifically prayed for under paragraph 1 of this prayer.

4. And all other proper and equitable relief that the Court may grant.

Meyer Fix, Attorney for Plaintiff, Office and P. O. Address, 500 Powers Building, Rochester 14, New York.

[fol. 12] AFFIDAVIT OF MEYER FIX

STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

Meyer Fix, being duly sworn, deposes and says:

1. That he is an attorney at law with offices at 500 Powers Building, in the City of Rochester, New York, and that he is the attorney for N. P. Rychlik, individually, and on behalf of and as representative of other employees, trainmen of the Pennsylvania Railroad, on behalf of whom the claims are made in the above entitled action.

2. N. P. Rychlik was first cited for violation of the Union Shop Agreement between the defendant Company and the Brotherhood of Railroad Trainmen (Exhibit A) over 2 years ago. The plaintiff had previously been a member in good standing of the Brotherhood of Railroad Trainmen (hereinafter referred to as B.R.T.), until in or about February, 1953.

3. In or about February, 1953 the plaintiff, N. P. Rychlik, resigned his membership from the said B.R.T. and became a member in good standing of the United Railroad Operating Crafts (hereinafter referred to as UROC) which the plaintiff fully believed in good faith to be a railroad union national in scope.

4. Sometime after February of 1953, plaintiff was cited for non-compliance with the Union Shop Agreement between the defendant Company and the B.R.T. (Exhibit A). Subsequent to this time and on or about August 27, 1953 plaintiff was given a hearing under the provisions of the said Union Shop Agreement (Exhibit A), at which time an ultimate decision was postponed until such time as there might be a

[fol. 13] more conclusive determination as to whether the said UROC was in fact a Union national in scope.

5. That on August 23, 1954, at a hearing conducted in Pittsburgh, Pennsylvania, the plaintiff, through your deponent, presented receipts and gave evidence of the fact that the plaintiff had joined the Switchmen's Union of North America on July 31, 1954, and that plaintiff was a member in good standing as of the time of the hearing.

6. Plaintiff has been since July 31, 1954 and is as of the present a member in good standing of the Switchmen's Union of North America, a union which is uniformly recognized as being national in scope, as that term is employed in the Railway Labor Act.

7. That despite the fact that the plaintiff is presently a member in good standing of the Switchmen's Union of North America, and in spite of the fact that there has been no conclusive determination of the status of the said UROC, and despite the fact that administrative proceedings have been instituted by the said UROC to have itself recognized as national in scope, the plaintiff received on the 3rd of January, 1955, a letter from the System Board of Adjustment, annexed hereto as Exhibit B, informing him of the decision of the said Board that he had not complied with the Union Shop Agreement between the defendant Company and the B.R.T. (Exhibit A).

8. That despite the fact that the said agreement between the defendant Company and the B.R.T. (Exhibit A), violates the principles of American jurisprudence, in respect to the plaintiff and his fellow employees, in that it sets up the representative of the said B.R.T. as accuser, prosecutor, judge, and jury, and despite the fact that the plaintiff is presently a member in good standing of the Switchmen's Union of North America, uniformly conceded to be a union national in scope under the terms of the Railway Labor Act, [fol. 14] the plaintiff was notified by the defendant Company, through its agents, by a telephone call on or about January 14, 1955, that he was out of service.

9. That the said phone call was the first notification that the plaintiff received that he was out of service, and therefore the plaintiff was unable to petition the Court for a relief before his discharge, since he had no written notice thereof.

10. That on or about January 17, 1955 plaintiff received from the defendant Company, through its agent, E. Adams, Superintendent, (Exhibit C) written notification of the fact that his services had been terminated as of January 14, 1955.

11. That on information and belief plaintiff's fellow employees also received telephone notification of their discharge, and subsequent thereto received written notice of their discharge.

12. That because the plaintiff was in compliance with the provisions of the Railway Labor Act, providing that he must belong to a union which is national in scope, in that he belonged to the Switchmen's Union of North America, and because the procedures provided for in the Union Shop Agreement between the defendant Company and the B.R.T. (Exhibit A) are invalid in light of recognized principles of American jurisprudence in that they provide that the representative of the Union may act as accuser, prosecutor, judge, and jury, and in that the plaintiff and his fellow employees, have made every reasonable effort, to rejoin the B.R.T. and all such efforts have been thwarted by the B.R.T., your deponent strongly urges that the relief prayed for be granted in this action.

Meyer Fix.

Subscribed and sworn to before me this 24th day of January, 1955. Esther C. Bridges, Notary Public, State of New York, County of Monroe. Commission expires March 30, 1956.

[fol. 15] EXHIBIT A

Union Shop Agreement

This agreement is entered into this 26th day of March, 1952, in accordance with Section 2, Eleventh of the Railway Labor Act, as amended, by and between The Pennsylvania Railroad Company (hereinafter referred to as the "Carrier") and its employes of the crafts or classes represented by the Brotherhood of Railroad Trainmen (hereinafter referred to as the "Brotherhood").

It is hereby agreed:

1. Subject to the terms and conditions hereinafter set forth, all employes of the Carrier now or hereafter subject

to the rules and working conditions agreement between the parties hereto shall, as a condition of their continued employment subject to such agreement, become members of the Brotherhood party to this agreement representing their crafts or classes within sixty (60) calendar days of the date and they first perform compensated service as such employes after the effective date of this agreement, and thereafter shall maintain membership in good standing in such Brotherhood while subject to the rules and working conditions agreement between the parties; provided, however, that the foregoing requirement for membership in the Brotherhood shall not be applicable to:

(a) Employes to whom membership is not available upon the same terms and conditions as are generally applicable to any other member, or

(b) Employes to whom membership has been denied or terminated for any reason other than the failure of the employe to tender the periodic dues, initiation fees and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership in the Brotherhood, or

[fol. 16] (c) Employes covered by the rules and working conditions agreement between the parties, who maintain membership in any one of the other labor organizations, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employes of a craft or class in engine, train, yard or hostling service; provided, that nothing contained in this agreement shall prevent an employee from changing membership from one organization to another organization admitting to membership employes of a craft or class in any of said services.

2. Employes who retain seniority under the rules and working conditions agreement, between the parties hereto, governing their classes or crafts and who are assigned or transferred for a period of thirty (30) calendar days or more to employment not covered by such agreement, or who are on leave of absence for a period of thirty (30) calendar days or more, will not be required to maintain membership as provided in Section 1 of this agreement so long as they remain in such other employment, or on such leave of absence, but they may do so at their option. If and when

such employes return to any service covered by the said rules and working conditions agreement, they shall, as a condition of their continued employment subject to such agreement, comply with the provisions of Section 1 of this agreement within thirty (30) calendar days of such return to service.

3. An employe whose membership in the Brotherhood is terminated while on furlough due to reduction in force, or while off duty on account of sickness or injury for a period of thirty (30) calendar days or more, and who is required to maintain membership under the provisions of Section 1 of this agreement, shall be granted upon his return to service in any of the crafts or classes represented by the Brotherhood a period of thirty (30) calendar days within which to become a member of the Brotherhood.

[fol. 17] 4. Every employe required by the provisions of this agreement to become and remain a member of a labor organization shall be considered by the Carrier to be either a member of the Brotherhood as provided for herein or to be a member of any one of the other labor organizations referred to in Section 1 hereof, unless the Carrier is advised to the contrary in writing by the Brotherhood. The Brotherhood shall be responsible for initiating action to enforce the terms of this agreement.

5. (a) The General Chairman of the Brotherhood will, between the fifteenth day and the last day of any calendar month, furnish to the Superintendent of the Division involved, in writing and in duplicate, the name and roster number of each employe whose seniority and employment the Brotherhood requests be terminated by reason of failure to comply with the membership requirements of this agreement.

(b) In the event that the Superintendent wishes to dispute the correctness of the Brotherhood's position, he shall so notify the General Chairman within ten (10) calendar days of receipt of the notice from the latter, stating the reasons therefor. If no such exception is taken by the Superintendent, or if the General Chairman does not withdraw the notice within ten (10 calendar days from the date of the Superintendent's notice of exception, the Superintendent will transmit to the employe at his last known ad-

dress through registered United States mail with return receipt requested, the original of the General Chairman's notice, accompanied by an explanatory letter.

(c) Within ten (10) calendar days from the date of the Superintendent mailing notice to the employe, as provided in paragraph (b) of this Section 5, the said employe's seniority and employment in the crafts or classes represented by the Brotherhood shall be determined, unless the notice is withdrawn by the Brotherhood in the interim, or unless a proceeding under the provisions of Section 7 of this agreement is instituted.

[fol. 18] 6. The provisions of the rules and working conditions agreement between the parties pertaining to investigations, trials and appeals, are inapplicable to the termination of seniority and employment provided for in this agreement.

7. (a) For the sole purpose of handling and disposing of disputes arising under this agreement, a System Board of Adjustment is hereby established, in accordance with Section 3, Second, of the Railway Labor Act, as amended, which shall consist of four members, two to be appointed by the Carrier and two by the Brotherhood.

(b) An employe notified in accordance with the provisions of Section 5 hereof that he has failed to comply with the membership requirements of this agreement and who wishes to dispute the fact of such failure shall, if he submits request to the Secretary of the System Board of Adjustment within a period of ten (10) calendar days from the date of mailing of such notice, be given a hearing. The Secretary of the Board will notify the employe in writing the time and place at which such hearing will be held. The hearing shall be confined exclusively to the question of the employe's compliance with the provisions of this agreement. The employe will be required at this hearing to furnish substantial proof of his compliance with the provisions of this agreement.

(c) The decision of the System Board of Adjustment shall be by majority vote and shall be final and binding.

(d) In the event the System Board of Adjustment is unable to reach a decision, the matter will be submitted to a neutral arbitrator to be selected by the National Media-

tion Board, whose decision as to whether or not the employe has complied with the provisions of this agreement shall be final and binding.

(e) Receipt by the Secretary of the Board of notice from an employe that he wishes to dispute the charge that he has [fol. 19] failed to comply with the membership requirements of this agreement shall operate to stay action on the termination of his seniority and employment pending final decision and for a period of ten (10) calendar days thereafter.

(f) The fee and expenses of the neutral arbitrator, which shall be limited to the amount regularly established by the National Mediation Board for such service, shall be borne equally by the Carrier and the Brotherhood.

8. (a) Neither this agreement nor any provision contained herein shall be used as a basis for a grievance or time or money claim against the Carrier, nor shall any provision of any other agreement between the parties hereto be relied upon in support of any claim that may arise as the result of the operation of this agreement.

(b) In the event that seniority and employment in the crafts or classes covered by this agreement is terminated under the provisions of this agreement, and such termination of seniority and employment is subsequently determined to be improper, the employe whose seniority and employment was so terminated shall be returned to service in said crafts or classes without impairment of seniority rights. In the event an employe brings an action for allegedly wrongful discharge, the Brotherhood and the Carrier shall share equally any liability imposed in favor of such employe, except in a case where the Railway Labor Act, as amended, and this Agreement under it are held by a court of competent jurisdiction to be illegal or unconstitutional or in violation of State Statutes; or where the Carrier is the plaintiff or moving party in any action; or where the Carrier acts in collusion or collaboration with an employe seeking damages, resulting from termination of his seniority and employment.

9. This agreement is in full, final and complete settlement of the dispute growing out of the request contained

[fol. 20] in the notice served on The Pennsylvania Railroad Company on February 1, 1951, by the Brotherhood of Railroad Trainmen, except the request for deduction of union dues shall be subject to further negotiation between the parties hereto. This agreement shall become effective April 1, 1952, and shall remain in effect until revised or cancelled in accordance with the procedure prescribed by the Railway Labor Act, as amended.

The Pennsylvania Railroad Company, By: (S.) J. A. Schwab, General Manager, Eastern Region; (S.) A. J. Greenough, General Manager, Central Region; (S.) J. B. Jones, General Manager, Western Region; Road and Yard Conductors, Road and Yard Brakemen, Baggagemen, Ticket Collectors, Car Retarder Operators, Switchtenders and Hump Motor Car Operators, Employes of the Pennsylvania Railroad Company, By: Brotherhood of Railroad Trainmen, By: (S.) H. F. Sites, General Chairman; (S.) U. D. Hartman, General Chairman.

Philadelphia, Pa., March 26, 1952.

[fol. 21] EXHIBIT "B"

The Pennsylvania Railroad—Baltimore and Eastern Railroad—Brotherhood of Railroad Trainmen—System Board of Adjustment

Room 459, Pennsylvania Station, 30th Street, Philadelphia, Pa. Hearing No. 110

Mr. N. P. Rychlik, 315 North Ogden Street, Buffalo 6, New York

DEAR SIR:

This letter is in reference to hearings held at Pittsburgh, Pa., on August 27, 1953 and August 23, 1954, under the provisions of the Union Shop Agreement effective April 1, 1952 between The Pennsylvania Railroad Company and its employes represented by the Brotherhood of Railroad Trainmen.

Following thorough review, consideration and discussion of the evidence the Board first concluded that membership

in the United Railroad Operating Crafts does not constitute compliance with the Union Shop Agreement. And in the light of this determination rendered the following decision in your case:

Decision: N. P. Rychlik has not complied with the membership requirement for continued employment as set forth in the Union Shop Agreement effective April 1, 1952.

[fol. 22] By order of The Pennsylvania Railroad—Baltimore and Eastern Railroad—Brotherhood of Railroad Trainmen—System Board of Adjustment.

(S.) W. E. Conrad, Secretary.

Dated at Philadelphia, Pa., on the 3rd day of January, 1955.

cc: Mr. E. P. Adams, Superintendent, Northern Division.

EXHIBIT "C"

Buffalo, N. Y., January 14, 1955. 18-PC

Mr. N. P. Rychlik, 315 North Ogden Street, Buffalo, 6, N. Y.

DEAR SIR:

In compliance with decision contained in letter dated January 3, 1955 addressed to you from the System Board of Adustment, your seniority and service will be terminated as of January 14, 1955.

Yours truly, E. P. Adams, Superintendent.

[fol. 23] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

[Title omitted]

ORDER TO SHOW CAUSE—Entered January 28, 1955

Upon reading the annexed Complaint of N. P. Rychlik, individually and on behalf of and as representative of other employees of the Pennsylvania Railroad, duly verified the 21st day of January, 1955, and the affidavit of Meyer Fix, Esq., sworn to the 24th day of January, 1955, and the exhibit

annexed thereto and sufficient cause appearing therefore, it is

Ordered, that the defendants U. D. Hartman, individually and as a member of and on behalf of and as representative of the Brotherhood of Railroad Trainmen, H. F. Sites, individually and as a member of and on behalf of and as representative of the Brotherhood of Railroad Trainmen, [fol. 24] S. G. Gailey, individually and as a member of and on behalf of and as representative of the Brotherhood of Railroad Trainmen, and the Pennsylvania Railroad Company, Inc. and each of them, show cause before this Court at a term thereof to be held at the District Court Building in the City of Buffalo, County of Erie, on the 3rd day of February, 1955, at 2 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard why an Order should not be made by this Court restraining the said defendants, and each of them, and granting the relief prayed for in the annexed verified Complaint, and it is further

Ordered, that service of this Order by United States mail sent special delivery and registered upon the said U. D. Hartman, H. F. Sites, S. G. Gailey, not later than the 31st day of January, 1955, shall be sufficient and it is further

Ordered, that service of this Order upon the Defendant Pennsylvania Railroad Company, not later than the 31st day of January, 1955, shall be sufficient.

John Knight, United States District Court Justice
for the Western District of the State of New York.

IN UNITED STATES DISTRICT COURT

ORDER PERMITTING INTERVENER—Entered March 2, 1955

The individual defendants, U. D. Hartman, H. F. Sites and S. G. Gailey, having appeared specially and objected to alleged service of process upon them as defective, moved [fol. 25] to dismiss the plaintiff's complaint as to each and all of said defendants, and said motion having been granted by the Court, and

The Brotherhood of Railroad Trainmen, an unincorporated association, having moved to intervene as a party

defendant in the above entitled action, and the plaintiff and the co-defendant, Pennsylvania Railroad Company, having consented thereto,

Now, on motion of Harold J. Tillou, attorney for the Brotherhood of Railroad Trainmen, it is hereby

Ordered that the Brotherhood of Railroad Trainmen be and hereby is granted authority and permission to intervene as party defendant.

And it is further ordered that the action and all proceedings in the future shall be entitled N. P. Rychlik, individually and on behalf of and as representative of other employees of the Pennsylvania Railroad, Plaintiff, against Brotherhood of Railroad Trainmen, an unincorporated association, Intervening Defendant, and The Pennsylvania Railroad Company, a corporation, Defendant.

And it is further ordered that the said intervening defendant, Brotherhood of Railroad Trainmen, shall have twenty days in which to file an answer to the plaintiff's complaint from and after the determination of motions to dismiss the plaintiff's complaint, in the event that such answer shall be required.

John Knight, U. S. District Court Judge.

[fol. 26] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

[Title omitted]

DEFENDANT BROTHERHOOD'S MOTION TO DISMISS—Entered March 2, 1955

The Brotherhood of Railroad Trainmen, intervening defendant, moves to dismiss the plaintiff's complaint upon the law upon the following grounds:—

1. That the plaintiff has not set forth a cause of action in his complaint.

2. That the Court has no jurisdiction to determine the alleged issues involved.

3. That the alleged issues are solely within the determination of the System Board of Adjustment under the System Adjustment Board established pursuant to the Railway Labor Act.

4. That the plaintiff's complaint should be dismissed.

Dated, February 8, 1955.

Yours etc., Harold J. Tillou, Attorney for Intervening Defendant, Office and P. O. Address, 510 Erie County Bank Building, Buffalo, New York.

[fol. 27] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

[Title omitted]

DEFENDANT PENNSYLVANIA RAILROAD'S MOTION TO DISMISS —Filed June 22, 1955

Proceedings had before Hon. John Knight, United States District Judge, Western District of New York, at Buffalo, New York, February 8, 1955, at 2:00 o'clock P. M.

Appearances:

Meyer Fix, Esq. and Norman Spindelman, Esq., Attorneys for Petitioners.

Harold J. Tillou, Esq., Attorney for Brotherhood of Railroad Trainmen.

Adams, Smith, Brown and Starrett, Esqs., by Percy Smith, Esq., of Counsel, and Richard N. Clattenburg, Esq., Assistant General Counsel for Pennsylvania Railroad, attorneys for The Pennsylvania Railroad.

Mr. Tillou: Now, if the Court please, at this time I move that the individual defendants named, V. D. Hartman, H. F. Sites and S. G. Gailey, be stricken out as party defendants.

The Court: You said they haven't been served?

[fol. 28] Mr. Tillou: One has been served.

Mr. Fix: Let me acquaint your Honor with what has transpired since we were here last week. Mr. Tillou called me in Rochester last week and asked me if I would have any objection to having these three individuals, as individuals,

dropped and I said no objection and then he said he was going to intervene with the Brotherhood organization and on that we have no objection.

The Court: Motion is granted.

Mr. Tillou: Now I ask that the Brotherhood of Railroad Trainmen be allowed to intervene as a party defendant in this action.

Mr. Fix: Satisfactory.

The Court: So ordered.

Mr. Tillou: I suggest I prepare an order for your Honor to that effect and I will furnish that later.

The Court: Very well.

Mr. Tillou: At this time, on behalf of the Brotherhood of Railroad Trainmen, I move that the complaint be dismissed on the law and I realize, from what you Honor has said, this is, I believe, strictly a question of law. It is too complicated to ask your Honor to make a decision on it and we will certainly have to submit briefs.

The Court: I have been through the papers so I understand perfectly well what the situation is.

Mr. Clattenburg: Your Honor, I also would like to note a motion to dismiss on the ground that the complaint fails to state a cause of action.

(Argument on motion.)

[fol. 29] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

N. P. RYCHLIK, individually and on behalf of and as representative of other employees of the Pennsylvania Railroad, Plaintiff,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, an unincorporated association, Intervening Defendant,

and

PENNSYLVANIA RAILROAD COMPANY, Defendant.

OPINION OF COURT—Filed February 23, 1955

Appearances:

Meyer Fix, 500 Powers Building, Rochester, N. Y., Attorney for Plaintiffs.

Harold J. Tillou, 501 Erie County Bank Building, Buffalo, New York, Attorney for Intervening Defendant, Brotherhood of Railroad Trainmen.

Adams, Smith, Brown & Starrett, Walbridge Building, Buffalo, New York, Attorneys for Defendant, Pennsylvania Railroad Company.

The above entitled matter comes before this Court on an order to show cause obtained by the plaintiff why an order should not be made restraining and granting certain injunctive relief against the defendants, Hartman, Sites, and Gaily, individually and as members of and representatives of the Brotherhood of Railroad Trainmen (hereinafter called "BRT") and the Pennsylvania Railroad (hereinafter called "Penn"). By consent of the parties, the BRT was permitted to intervene as defendants in place of the individuals, Hartman, Sites, and Gaily.

[fol. 30] The complaint was verified, and attached thereto was an affidavit of the attorney for the plaintiff, purported to be made on knowledge and not on information and belief. It will be seen that numerous matters touching the determination herein are included in the affidavit which are not set forth in the complaint. It seems obvious that the attorney could have no personal knowledge of various of the alleged facts set forth in the affidavit. However, in view of the decision at which I arrive, the affidavit of the at-orney will be considered.

The defendants have moved to dismiss the complaint on the grounds that the plaintiff has not set forth a cause of action in his complaint; that the Court has no jurisdiction to determine the alleged issues involved; and that the alleged issues are solely within the determination of the System Board of Adjustment established pursuant to the Railroad Labor Act. As alleged in the Complaint, such employees were discharged by Penn upon notice served on or about January 17, 1955 and, as also alleged in the Complaint, during the year 1953 they "allowed their membership to lapse". The plaintiff timely appealed to the System Board of Adjustment and their appeal was pending until January 17, 1955, when the plaintiff was discharged. The delay apparently was caused by the effort to determine whether membership in the United Railroad Operating

Crafts (hereinafter referred to as "UROC") constituted compliance with Union Shop Agreement. Meanwhile the plaintiff continued in his employment till his discharge.

A temporary restraining order was sought, but this was refused since the plaintiff had already been discharged. A permanent injunction is now sought for the reinstatement of the plaintiff and his fellow employees on the ground their discharge for non-compliance with the Union Shop Agreement between the BRT and Penn was illegal. A copy of such Agreement was attached as a part of the Complaint. [fol. 31] It appears that plaintiff was a member of UROC at the time of his discharge and as appears from the discharge notice set out in the Complaint that plaintiff was discharged because membership in UROC did not constitute compliance with the Union Shop Agreement. (Exhibit A.) The BRT is a union organization, certified under the Railway Labor Act to represent operating employees of Penn employed as brakemen and conductors on its railroad lines. Plaintiff was a trainman.

On or about the 26th day of March, 1952, BRT and Penn entered into a Union Shop Agreement, pursuant to the provisions of Sec. 2 Eleventh of the Railway Labor Act, as amended. (Exhibit A attached to the Complaint.) Plaintiff asserts that he joined the Switchmen's Union on July 31, 1954 and he presented proof of such membership at a hearing in Pittsburgn, Pa. on August 23, 1954. What his status was as regards UROC then or now does not appear

In the complaint there is no allegation that the plaintiff became a member of UROC, but the affidavit contains this statement: "In or about February 2, 1953, the plaintiff, Rychlik, resigned his membership from the said BRT and became a member in good standing of the Railroad Operating Crafts, which the plaintiff fully believed in good faith to be a railroad union national in scope.

It is significant that this is made by the attorney for the plaintiff. It also appears from a further statement in such affidavit that plaintiff was a member of the BRT until in or about February, 1953. On August 23, 1954, at Pittsburgh, Penn., the plaintiff presented proofs showing that he had joined the Switchmen's Union of North America on July 31, 1954, and that the plaintiff was a member in good

standing in the Switchmen's Union as of the time of the hearing; that since that time he has continued as a member [fol. 32] in good standing of the Switchmen's Union of North America, which is recognized as being national in scope. It is alleged that there has been no conclusive determination of the status of the said UROC. On January 3, 1955, plaintiff was notified by the System Board of Adjustment of its decision that he had not complied with the Union Shop Agreement between the Penn. and BRT (Exhibit "B" attached to complaint). On January 14, 1955, he was orally notified by the defendant company that he was out of the service. On January 17, 1955, he received a written notification of the termination of his service as of January 14, 1955.

There is nothing in the complaint or affidavit which shows that plaintiff ever resigned membership in the UROC.

Section 153, Title 45, insofar as applicable, provides for the composition of Adjustment Boards and provides:

"Section 153

First.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First Division: To have jurisdiction over disputes involving train-and-yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organization of the employees.

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment

of system, group, or regional boards of adjustment for [fol. 33] the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board."

Section 152, Title 45, deals with collective bargaining and agreements between carriers and labor organizations and provides, in part:

"Section 152

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representatives of the craft or class for the purposes of this chapter.

* * * a labor organization * * * duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

Eleventh.

(c) The requirement of membership in a labor organization in an agreement made pursuant to sub-[fol. 34] paragraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, * * * if said employee shall hold or acquire membership in any one of the labor organizations, *national in scope*, (italics supplied) organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; * * * *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, *national in scope* (italics supplied) organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him."

In pursuance of the provisions of the Act, the BRT and the Penn. entered into an agreement (Exhibit "A" attached to complaint). Subdivisions 5 and 7 of that agreement are pertinent to the issues herein and provide:

"5. (a) The General Chairman of the Brotherhood will, between the fifteenth day and the last day of any calendar month, furnish to the Superintendent of the Division involved, in writing and in duplicate, the name and roster number of each employee whose seniority and employment the Brotherhood requests be terminated by reason of failure to comply with the membership requirements of this agreement.

(b) In the event that the Superintendent wishes to dispute the correctness of the Brotherhood's position, he shall so notify the General Chairman within ten (10) calendar days of receipt of the notice from the latter, stating the reasons therefor. If no such exception is taken by the Superintendent, or if the General Chairman does not withdraw the notice within ten (10) calendar days from the date of the Superintendent's

notice of exception, the Superintendent will transmit to the employee at his last known address through registered United States mail with return receipt re-
[fol. 35] quested, the original of the General Chairman's notice, accompanied by an explanatory letter.

(c) Within ten (10) calendar days from the date of the Superintendent mailing notice to the employee, as provided in paragraph (b) of this Section 5, the said employee's seniority and employment in the crafts or classes represented by the Brotherhood shall be terminated, unless the notice is withdrawn by the Brotherhood in the interim, or unless a proceeding under the provisions of Section 7 of this agreement is instituted.

7. (a) For the sole purpose of handling and disposing of disputes arising under this agreement, a System Board of Adjustment is hereby established, in accordance with Section 3, Second, of the Railway Labor Act, as amended, which shall consist of four members, two to be appointed by the Carrier and two by the Brotherhood.

(b) An employee notified in accordance with the provisions of Section 5 hereof that he has failed to comply with the membership requirements of this agreement and who wishes to dispute the fact of such failure shall, if he submits request to the Secretary of the System Board of Adjustment within a period of ten (10) calendar days from the date of mailing of such notice, be given a hearing. The Secretary of the Board will notify the employee in writing the time and place at which such hearing will be held. The hearing shall be confined exclusively to the question of the employee's compliance with the provisions of this agreement. The employee will be required at this hearing to furnish substantial proof of his compliance with the provisions of this agreement.

(c) The decision of the System Board of Adjustment shall be by majority vote and shall be final and binding."

It appears from the complaint and affidavit herein that this agreement was in effect at the time the plaintiff re-

signed from the BRT in February of 1953, and that in accordance with that agreement, his grievance was heard before the System Board of Adjustment set up in accord-
[fol. 36] ance thereto. The proceedings before said Board were not certified herewith in this action nor was any transcript of the same furnished to the Court; in fact, the complaint itself is silent as to any such proceedings, nor does the prayer of said complaint request that such a review be made by the Court. The affidavit of the attorney for the plaintiff states that the proceedings were conducted before the System Board of Adjustment and that, as a result of said proceedings, the discharge of the plaintiff was ordered. (See Exhibit "B" attached to the affidavit.)

That courts have reviewed proceedings before the System Board of Adjustment is well established.

Edwards v. Capital Airlines, 176 F. (2) 755
Michaels v. National Tube Co., 122 Fed. Supp. 726
Washington Tennessee Co. v. Boswell, 124 F. (2) 235

But even in those cases where the court reviewed such proceedings, it was held that judicial injuiry is at an end once it is determined (1) That the Board's procedure and the award conform substantially to the Statute and Agreement; (2) That the award confined itself to the letter of submission; and (3) That the award was not arrived at by fraud or corruption. *Farris v. Alaska Airlines*, 113 Fed. Supp. 907; *Moore* v. *Illinois Central*, 312 U. S. 630. There is nothing before the Court from which it can determine that the procedure and findings before the System Board of Adjustment did not conform substantially to the Statute and Agreement or that the finding of the Board was not confined to the matter submitted to it or that the award was arrived at by fraud or corruption. In *Bauer v. Eastern Airlines*, 214 F. (2) 623, the court, in reviewing the action of the
[fol. 37] Board had before it the entire administrative record from which it could properly review and pass on the propriety of the same. This Court has not been given the benefit of the record before the Board and of necessity must confine itself to the papers before it. The Court will not consider de novo the circumstances of the discharge of the plaintiff. See *Bauer* v. *Eastern Airlines*, supra. This does

not mean that in a proper case the court would be foreclosed from considering the essential fairness of the administrative proceeding, even if the issues are raised collaterally, and in a proper case, it would be the duty of the court to determine whether the Board had given the plaintiff a full and fair hearing and exercised its honest judgment in reaching its conclusion.

The fact that the agreement between the BRT and the Railroad provides for a System Board consisting of two representatives of the Railroad and two from the Union does not per se make such an agreement invalid. The courts, in recent years, have had before it for review many cases conducted before Boards of a similar structure and have commented that when a Board is so constituted, the award itself is presumably valid, (*Edwards v. Capital Airlines*, supra) but in a proper proceeding is not immune from judicial examination nor is the fact that some member of the Board might be prejudiced or that they might make an erroneous decision sufficient to give the court jurisdiction. There is no allegation in the complaint or proof submitted that any member of the Board so discriminated against the plaintiff as to bring this case within the rule of *Steele v. Louisville & N. R. Co.*, 323 U. S. 192. The Court is not faced with an agreement illegal in itself which might give it jurisdiction under the *Steele* case, supra. See also *Tunstall v. Brotherhood of Locomotive Firemen, Enginemen*, 323 U. S. 210 and *Brotherhood of Railroad Trainmen v. Howard*, 343 [fol. 38] U. S. 768. The courts have, on many occasions, distinguished between the *Steele, Tunstall*, and *Howard* cases, supra, and cases such as the case at bar which involves the interpretation or application of agreements, and that distinction has been made clear in many decisions, e. g., *Spires v. Southern Railway Co.*, 204 F. (2) 453; *Hayes v. Union Pacific Railroad Co.*, 184 F. (2) 337; *United Railroad Operating Crafts v. Northern Pacific Railroad Co.*, 208 F. (2) 135, cert. den. 347 U. S. 929; and *United Railroad Operating Crafts v. Pennsylvania Railroad*, 212 F. (2) 938.

In the instant case, neither the Railroad nor the Brotherhood has filed any answer, but the question of jurisdiction and sufficiency of the complaint have been raised by both, and the Court, in any event, would be bound to consider such

questions even if not raised. *U. S. v. Corrick*, 298 U. S. 435, *United R. R. Operating Crafts v. Pennsylvania Railroad*, 221 F. (2) 938; and the recent case of *Alabaugh v. Baltimore & Ohio Railroad Co.*, 125 Fed. Supp. 401. This Court, on the facts presented, finds no invalidity in the agreement.

The plaintiff claims that after his resignation in the BRT, the BRT refused to reinstate him. There appears to be no grounds for the equitable intervention of this Court for such refusal. A like question was discussed by the court in *Alabaugh v. Baltimore & Ohio Railroad Co.*, supra, wherein the court, at page 407, said:

> "When plaintiffs applied for reinstatement in Brotherhood, it was within the discretion of that organization whether or not they should be reinstated. There is no provision in the statute or in the agreement with B & O which requires such action.
>
> The courts cannot require individuals or associations to be forgiving or generous nor prevent the operation of the rule that 'they that take the sword shall perish with the sword' unless some constitutional or other [fol. 39] legal right or immunity is threatened. Nor does the action of Brotherhood in reinstating some members who had been less active in UROC create any right in plaintiffs to secure an order for reinstatement in this case.
>
> So far as Brotherhood's refusal to reinstate plaintiffs affects their discharge by B & O, it is clearly a dispute similar to those which the courts have held to be within the primary jurisdiction of the Adjustment Board."

The plaintiff also claims that at the time of his discharge, he was a member of the Switchmen's Union of North America, a union "national in scope", recognizable under the Railroad Act. Unquestionably, the Act itself does not require any employee to belong to any particular Union as long as it has been recognized as national in scope and the majority of any craft have the right to determine who shall be the representatives of the craft or class (Sec. 152, Title 45, U. S. C.), and that nothing in any agreement shall prevent the employee from changing membership from one

organization to another organization (Sec. 152, Eleventh (c), Title 45, U. S. C.). It would appear that the Act, however, contemplates the continued membership in a Union national in scope. That the BRT and Switchmen's Union are such is admitted. The plaintiff in the instant case ceased, by his own act, his membership in the BRT and did not join the Switchmen's Union until shortly before his final hearing before the System Board in August 1954, although he had been cited before the Board and given a hearing as early as August of 1953. Judge Thomsen, in the *Alabaugh* case, at pages 406 and 407, stated:

> "*Maintenance* of membership within the contemplation of that amendment means continued payment of dues to a qualifying union. The reason for such requirement is obvious, and is discussed in *Pigott v. Detroit T. & I. R. Co.*, 116 Fed. Supp. at 955, note 11. In the case at bar plaintiffs withdrew from the Brotherhood and stopped paying dues to it. For that reason they were expelled by Brotherhood, and are being discharged by B. & O."

[fol. 40] And again:

> "Plaintiffs voluntarily stopped paying dues to Brotherhood and terminated their membership therein, in order to join and be active in a rival union. Plaintiffs gambled heavily for a stake which must have seemed worth the risk to them at that time. By terminating their membership in Brotherhood and ceasing to pay dues to it, they made themselves subject to discharge by B & O under the terms of the union shop agreement, unless they could show that UROC was a labor organization which qualified under section 152 Eleventh (c). * * * But they have chosen to stake all on UROC. Having lost, they sought reinstatement in Brotherhood."

I therefore hold that the Statute itself contemplates continued membership in a qualified union and that that question was one for proper determination in the first instance by the System Board of Adjustment. The plaintiff, in his

brief, has requested this Court to pass on the question as to whether UROC is national in scope.

It is not necessary for this Court to decide under the facts submitted in this case whether UROC is a labor organization "national in scope." In fact, that function, under the Railway Act, is left to specific administrative procedure. The National Mediation Board, provided for in Section 154, Title 45, U. S. C., and consisting of three public members appointed by the President, is authorized (Sec. 152, Ninth, 45 USC) whenever a jurisdictional dispute arises between rival unions, to investigate such dispute and then to certify the union which is to act as bargaining representative for the employees in question. Such certifications are held to be exclusively within the competency of the National Mediation Board and its decisions are conclusive and not subject to review. (*Switchmen's Union of North America v. Na-*[fol. 41] *tional Mediation Board*, 320 U. S. 297; *General Committee v. Missouri K. T. R. Co.*, 320 U. S. 323.) In the latter case, the court said:

> "However wide may be the range of jurisdictional disputes embraced within Section 2, Ninth, Congress did not select the Courts to resolve them. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board."

The special administrative procedure of Section 153 is therefore vested with exclusive jurisdiction to determine whether a labor organization is national in scope and organized in accordance with the Act when a dispute arises pursuant to the right of the labor organization to participate in the National Railroad Adjustment Board machinery as said in *Pigott v. Detroit, T. & I. R. Co.*, 116 F. Supp. 949 (1953) at page 954:

> "It is the type of issue which those that are conversant with the specialized problems of the railroad industry are most capable of evaluating."

Again, the court, in the Pigott case, remarked:

> "If the question of its status were open to the courts, which are located in various areas of the nation, it is

conceivable that such different jurisdictions would reach contrary conclusions if concurrent suits with separate carriers were to be litigated."

For the reasons stated herein, the Court denies the application for an injunction pendente lite and the motion to dismiss the complaint is granted. (Entry of the order herein, however, will be delayed for the period of one week to afford the plaintiffs opportunity to apply for an injunction pending appeal if they decide to appeal.)

John Knight, United States District Judge.

February ——, 1955.

[fol. 42] IN UNITED STATES DISTRICT COURT

ORDER DISMISSING COMPLAINT, ENTERED MARCH 4, 1955

[Title omitted]

An order to show cause having heretofore been granted by the HON. John Knight, United States District Judge for the Western District of New York, upon the complaint of the plaintiff, verified the 21st day of January, 1955, and the affidavits of Meyer Fix, sworn to the 24th day of Jan- [fol. 43] uary, 1955, together with exhibits thereto attached, returnable before this Court on the 3rd day of February, 1955, ordering the defendants to show cause "why an order should not be made by this Court restraining the said defendants, and each of them, and granting the relief prayed for in the annexed verified complaint," and

The defendants U. D. Hartman, individually and as a member of and on behalf of and as representative of the Brotherhood of Railroad Trainmen, H. F. Sites, individually and as a member of and on behalf of and as representative of the Brotherhood of Railroad Trainmen, and S. G. Gailey, individually and as a member of and on behalf of and as representative of the Brotherhood of Railroad Trainmen, having duly appeared specially and objected to service of process, and the matter having been duly adjourned to the 10th day of February, 1955, and

The defendants U. D. Hartman, individually and as a member of and on behalf of and as representative of the Brotherhood of Railroad Trainmen, H. R. Sites, individually and as a member of and on behalf of and as representative of the Brotherhood of Railroad Trainmen, and S. G. Gailey, individually and as a member of and on behalf of and as representative of the Brotherhood of Railroad Trainmen, having moved for dismissal of the complaint as against them, and said motion having been granted by consent of all parties, and

The Brotherhood of Railroad Trainmen having moved to intervene as party defendant, and said motion to intervene having been duly granted by the Court by consent of all the parties, and the cause having been continued under the amended title of N. P. Rychlik, individually and on behalf of and as representative of other Employees of the Pennsylvania Railroad, Plaintiff, against Brotherhood of Railroad Trainmen, an unincorporated association, Intervening Defendant, and Pennsylvania Railroad Company, Defendant, and

[fol. 44] The Pennsylvania Railroad Company and the Brotherhood of Railroad Trainmen having duly moved to dismiss the plaintiff's complaint on the ground of lack of jurisdiction and upon the ground that the complaint failed to state a cause of action, and the parties having duly submitted the question to the Court for determination, Meyer Fix, attorney, appearing on behalf of the plaintiff, and Harold J. Tillou, attorney, appearing on behalf of the Brotherhood of Railroad Trainmen, and Adams, Smith, Brown & Starrett, attorneys, Percy R. Smith, of Counsel, on behalf of the Pennsylvania Railroad Company, and due deliberation having been had thereon,

Now, on motion of Harold J. Tillou, attorney for the Brotherhood of Railroad Trainmen, and Percy R. Smith, of counsel for the defendant Pennsylvania Railroad Company, it is hereby.

Ordered, decreed and adjudged that the restraining order demanded by the plaintiff be and hereby is denied as to the named plaintiff and as to all other employees of the Pennsylvania Railroad Company as a class in this action who are represented by or purport to be represented by the plaintiff N. P. Rychlik.

And it is further ordered that the plaintiff's complaint be and hereby is dismissed and upon the ground that the plaintiff's complaint fails to state a cause of action.

And it is further ordered that said complaint be dismissed as to the plaintiff, N. P. Rychlik, and as to all other employees of the Pennsylvania Railroad Company as a class in this action who are represented by or purport to be represented by the plaintiff N. P. Rychlik.

John Knight, United States District Court Judge.

[fol. 45] UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL—Filed April 1, 1955

Notice is hereby given that N. P. Rychlik, Individually and on behalf of and as Representative of other employees of the Pennsylvania Railroad, plaintiff above-named, hereby appeals to the United States Court of Appeals for the Second Circuit, from an order of Hon. John Knight, entered in this action on the 2nd day of March, 1955, dismissing the complaint for failure to state a cause of action, and denying the plaintiff's application for an injunction pendente lite, and from each and every part of said order, as well as the whole therefore. All questions of law will be raised for review.

Dated: March 31, 1955.

Meyer Fix, Attorney for the Appellant, N. P. Rychlik, Individually and on behalf of and as representative of other employees of the Pennsylvania Railroad, Office and P. O. Address, 500 Powers Building, Rochester 14, New York.

[fol. 46] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME FOR FILING RECORD, ENTERED MAY 9, 1955

On application of the plaintiff ex parte, the Court being fully advised, it is

Ordered that the time for filing the record on appeal in the United States Court of Appeals for the Second Circuit, and for docketing therein the appeal taken by plaintiff by notice of appeal filed April 1, 1955, is extended to June 30, 1955 pursuant to Rule 73(g) of the Federal Rules of Civil Procedure.

Dated: May 9, 1955.

(S.) Harold P. Burke, U. S. D. C. J.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF MEYER FIX

(Same title)

STATE OF NEW YORK,

County of Monroe, City of Rochester, ss:

Meyer Fix, being duly sworn, deposes and says:

1. That he is an attorney-at-law before the Bar of the Courts of the State of New York and of the United States District Court for the Western District of New York, and has offices at 500 Powers Building in the City of Rochester, State of New York, and that he is the attorney of record for N. P. Rychlik individually and on behalf of and as representative of other employees, trainmen of the Pennsylvania Railroad, on behalf of whom the claims are made in the above entitled action.

[fol. 47] That a Notice of Appeal was filed in the above entitled action on April 1, 1955 from an order of Hon. John Knight, entered in this action on the 2nd day of March, 1955, dismissing the complaint for failure to state a cause of action.

3. That a motion for reconsideration or for relief under Rule 60 (b) from order and final judgment was heard by the Hon. John Knight, District Judge, on March 21, 1955.

4. That the Hon. John Knight rendered a decision on the motion for reargument but because of illness was unable, and still is unable, to sign an order denying the motion for reargument.

5. That your deponent wishes to consolidate the appeal from the denial of the motion for reconsideration or for relief under Rule 60 (b) from order and final judgment, with the appeal taken from the order entered on March 2, 1955.

6. That your deponent has consulted with Harold J. Tillou, Esq., attorney for the intervening defendant, Brotherhood of Railroad Trainmen, and that Mr. Tillou has no objection to an extension for the time of docketing the record on appeal.

7. That your deponent respectfully requests the Court to extend the time for the docketing of the appeal under Rule 73 (g), so that both appeals may be consolidated before the Court of Appeals for the Second Circuit.

Meyer Fix.

Subscribed and sworn to before me this 9th day of May, 1955 Esther C. Bridges, Notary Public. Esther C. Bridges; Notary Public. State of New York, County of Monroe. Commission Expires March 30, 1958.

[fols. 48-64] IN UNITED STATES DISTRICT COURT

STIPULATION SETTLING RECORD—Filed June 22, 1955

It Is Hereby Stipulated by and between the attorneys for the respective parties herein that the record on appeal in the above entitled action shall consist of the Pages 1 to 57, inclusive, hereto attached, and that all other papers and documents on file in the Office of the Clerk of the United States District Court for the Western District of New York

shall be omitted from the appeal record as having no bearing upon or relation to the issues to be presented to the Court of Appeals upon this appeal.

Dated, June 22nd, 1955.

(S.) Meyer Fix, Attorney for Plaintiff; (S.) Harold J. Tillou, Attorney for Defendant Brotherhood of Railroad Trainmen; (S.) Adams, Smith, Brown & Starrett, Attorney for Pennsylvania Railroad Company, Defendant.

[fol. 65] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1955

No. 114

Docket No. 23709

N. P. RYCHLIK, INDIVIDUALLY, AND ON BEHALF OF THOSE SIMILARLY SITUATED, Appellant,

v.

PENNSYLVANIA RAILROAD COMPANY, Defendant-Appellee

and

BROTHERHOOD OF RAILROAD TRAINMEN, Intervenor-Appellee

OPINION—January 9, 1956

Before Hand, Frank and Medina, Circuit Judges

Appeal from a judgment of the District Court for the Western District of New York—Knight, J., presiding—summarily dismissing a complaint for reinstatement as a member of the intervening union and as an employee of the defendant railroad.

[fol. 66] Norman M. Spindelman, for the appellant.
Richard N. Clattenberg for the Railroad.
Harold J. Tillou for the Union.

HAND, Circuit Judge:

The plaintiff appeals from a judgment, summarily dismissing his complaint against the defendant Railway and

the intervening Union (a trades-union of railway conductors and brakemen). The complaint alleged that the plaintiff had been employed as a "trainman" of the Railway at a time when he was a member of the Union, from which he resigned in February, 1953, and in which other "trainmen," on whose behalf he sued, as "similarly situated," had allowed their membership to lapse. Shortly thereafter the plaintiff and the others, "similarly situated," joined another union, which it will be convenient to call U. R. O. C., and which they supposed to be "national in scope." The Railway and the first union had executed a Union Shop Agreement under subdivisions Eleventh, (a) and Eleventh, (c), of § 152 of Title 45, U. S. Code, which required employees to keep up their membership in the Union, or in another union, "National in scope," in order to be eligible as employees of the Railway. In execution of this contract the Union and the Railway had set up a "System Board of Adustment" under § 153, Second, of Title 45, to appear before which the "Union" cited the plaintiff, and which after a hearing decided that membership in "U.R.O.C." was not a compliance with the Union Shop Agreement. This resulted in depriving the plaintiff and the others, "similarly situated," of employment by the Railway, and he brought this action to procure reinstatement in the Union and reemployment by the Railway.

The plaintiff assumes that the District Court has jurisdiction to issue a mandatory injunction compelling the de- [fol. 67] fendants to accept the plaintiff as a member of the Union and as an employee of the Railway; but we need not decide more at this stage of the case than that in any event the action may stand as one for a declaratory judgment under § 2201, Title 28, U. S. Code. There is an "actual controversy within its" (the District Court's) "jurisdiction," for the plaintiff claims the right to membership and employment by virtue of statutes of the United States.* Section 2202 allows us to reserve our decision as to what "necessary or proper relief * * * may be granted," if he proves his case upon a trial.

The plaintiff raises two objections to the award of the

* § 1337, Title 28, U. S. C.

"System Board": (1) it had no jurisdiction over disputes between a union and its members or past members; and (2) the particular board here involved was disqualified to decide the issues, because two of its four members were members of the Union which the plaintiff and his fellows had abandoned in order to join "U. R. O. C." Our decision in *U. R. O. C.* v. *Wyer*, 205 Fed. (2) 153 (affirming on his opinion Judge Conger's dismissal of the complaint—115 Fed. Supp. 359), is an answer to the first point. It is true that the case involved the jurisdiction of the National Adjustment Board, and not that of a "System Board," but subdivision § 153, Second, gives to such boards authority to adjust and decide "disputes of the character specified in this section": that is, in subdivision First, which defines the authority of the National Adjustment Board. Indeed, independently of that decision as a precedent, we should have no doubt that the dispute at bar was within § 153, First, (i), as a dispute "between an employee or group of employees and a carrier * * * growing out of the interpretation or application of agreements concerning * * * [fol. 68] working conditions." How far the award of the "System Board," constituted as it was, is exempt from judicial review is indeed a different matter, upon which the courts do not appear to be in entire accord. All that we decided in *U. R. O. C.* v. *Wyer*, *supra*, was that an aggrieved union or employee must in any event first resort to the appropriate panel—in that case a panel of the National Adjustment Board—before it may apply to a court. Since, however, the text of § 153 applies without reserve to the occasion at bar, the award of the "System Board" will be final, unless either it is proper to imply an exception when half its members are members of the recognized union; or, if that be an unwarranted interpolation, then unless the section is *pro tanto* unconstitutional.

The defendants rely upon the decisions of the Seventh and Sixth Circuits in *U. R. O. C.* v. *Pennsylvania Railroad*, 212 Fed. (2) 938, and *Pigott* v. *Detroit, T. & I. R. R. Co.* 221 Fed. (2) 736. In the first of these the only actual holding was that the "primary jurisdiction" of such disputes as that at bar was in the "System Board";* but the

* *Slocum* v. *Delaware, L. & W. R. R. Co.*, 339 U. S. 239.

court went on to discuss the question whether a "competing" union, which the aggrieved employee asserted to be within § 152, Eleventh, (c) was "national in scope," might be decided in a proceeding under § 153, First, (f). The court did not indeed say that such a proceeding was an adequate remedy for any bias of the "System Board"; but we are in doubt as to what other significance the discussion was meant to have. At any rate the Sixth Circuit in the later case had before it an action brought after the employee had failed before the "System Board," in which he and the "competing" union both protested against the ruling of the board because of its presumptive bias; and the court plainly held that a proceeding under § 153, Second, (f) was an ade- [fol. 69] quate remedy. That decision is flatly in favor of the defendants at bar, and if the appeal is to succeed, we must interpret the Act differently, or declare it unconstitutional. Before discussing that question it will make our position plainer, if we say what we understand this supposed alternative remedy to be.

Subdivision (a) of § 153, First, prescribes as one among the qualifications of a union that is to be an elector of unions representing employees in panels of the National Adjustment Board, that it shall be "national in scope." In case a union's claim to be chosen as an elector is disputed, § 153, First, (f) declares that the Secretary of Labor shall first investigate the claim, and, if he decides it "has merit," that he shall notify the Mediation Board. That board will then ask those unions already qualified as electors to select one of their members to serve upon a "board of three" to pass upon the dispute, the applicant itself will select another member, and the Mediation Board will select the third. If the "board of three" grants the application of the union, it will necessarily have found that it is "national in scope"; and the argument appears to be that that is an adequate remedy for any bias of the "System Board," apparently because the finding of the "board of three" on that issu will be final.

With deference we cannot agree with this reasoning. In the first place when a union applies to be chosen as an elector there are other conditions that it must satisfy besides being "national in scope"; *i.e.*, it must be "organized

in accordance with" the Act, and it must be "otherwise properly qualified to participate in the selection of the labor members" of the National Board. (§ 153, First, (f).) The "board of three" may of course make a specific finding that the applicant union is not "national in scope," as the ground of refusing to admit it as an elector; but if it fails [fol. 70] to do so, it will be impossible to know whether this was in fact its ground for refusal; and a proceeding that may leave this issue undecided can hardly be intended as a remedy for any bias of the "System Board." Moreover, in any event the decision of the "board of three" would not be an adequate remedy to the employee. If for instance the "competing" union did not wish to be an elector, there is no reason why that should forfeit the employee's right to an impartial tribunal in deciding whether he should hold his job. Employees have no means of compelling the "competing" union to apply to be an elector; and, even if they had, we can see no justification for forcing them to accept that union as a surrogate to assert their right. As we read § 153, Eleventh, (c), their jobs are dependent only upon whether the "competing" union is in fact "national in scope"; and the Act should be construed to grant them the personal privilege of proving their right before an impartial tribunal.

If there is no alternative remedy open to the plaintiffs at bar, there must be some kind of judicial review of the finding against them by the "System Board." Nothing could more completely defeat the most elementary requirement of fair play; and nothing would more firmly entrench the recognized union in power; the temptation to fetch all jobs into that union would ordinarily be irresistible, especially when we remember that the union members of a "System Board" are likely to be persons of consequence in the union itself. Although it is true that *Edwards* v. *Capital Airlines*, 176 Fed. (2) 755 (C. A. D. C.) arose under other sections of the Act, its *ratio decidendi* applies so exactly to the case at bar that we adopt it as a precedent.

If it be argued that the result of our decision is inevitably to interject the courts into the enforcement of the right granted by § 152, Eleventh, (a), we answer that that is not necessarily true. Section 153, Second, provides that if

[fol. 71] either party to an "arrangement" setting up a "System Board" is dissatisfied, it may "elect to come under the jurisdiction of the Adjustment Board." Whether this implies that, if "dissatisfied," the parties must altogether abandon a "System Board" "arrangement," after they have set it up; or whether it allows them to limit the scope of its jurisdiction, we need not say. If it means the second, it will be possible in the agreement setting up a "System Board" to refer disputes such as that a bar to a panel set up under the National Adjustment Act, which can presumably be made impartial. If it means the first, it would indeed result in making inevitable a court review when a "System Board" decides against an employee in situations like that at bar. We can only answer that in that event there is a public interest in the impartial protection of any rights granted by an Act of Congress that transcends the immunity of labor disputes from all surveillance by a court of law.

Judgment reversed; cause remanded for trial in accordance with the foregoing opinion.

[fols. 72-73] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

N. P. RYCHLIK, ETC., Plaintiff-Appellant,

v.

PENNSYLVANIA RAILROAD CO., Defendant-Appellee,

BROTHERHOOD OF RAILROAD TRAINMEN, Intervening-Defendant-Appellee.

JUDGMENT—January 9, 1956

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court

be and it hereby is reversed and action remanded for trial in accordance with the opinion of this Court; with costs taxed in favor of the appellant.

(S.) A. Daniel Fusaro, Clerk.

[fol. 74] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 75] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 14, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The Solicitor General is invited to file a brief, as *amicus curiae*.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(408-5)